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## The Protection of Human Rights in the New Age of Terror

by Dalia Dorner

ALL DEMOCRATIC SYSTEMS MUST ENGAGE in a constant struggle to protect human rights. This is true in times of peace and calm. It is especially true in times of war or in a state of emergency, where the challenge assumes far greater dimensions. Israel is no exception. Furthermore, as both internal and external terror has forced Israel's Supreme Court to deal with a myriad of cases requiring a difficult balance between human rights and national security, it may indeed possess the most recent and comprehensive "hands on" experience in confronting this difficult issue that plagues a growing number of countries.

Israel has been forced to utilize a wide variety of means to battle terrorism, many of which by their very nature infringe upon human rights and thus greatly challenge human rights-minded courts. This challenge may even be greater in the State of Israel, not only due to the unique reality the State faces, but also due to its lack of a formal constitution.

### ISRAELI BASIC LAWS AND THE LIMITATIONS CLAUSE

IN RECENT YEARS, ISRAEL has enacted two new Basic Laws granting constitutional status to various human rights, although the protections of the rights mentioned therein are limited. The Basic Laws contain provisions protecting statutes, enacted prior to their entering into force, from judicial review. As most of the statutes relating to national security fall under these provisions, their content is theoretically protected. The Supreme Court, however, has repeatedly held that even statutes enacted prior to the Basic Laws must be interpreted to the extent possible in light of the directives of the Basic Laws, allowing for much protection of human rights to be afforded. Laws authorizing governmental authorities to infringe upon human rights are interpreted strictly and narrowly. In addition, we generally limit any discretion given to governmental authorities so as to guarantee that human rights are not infringed upon any more than absolutely necessary.

As is well known, human rights are generally not seen as being absolute, but the right to life, necessary to enable the potential exercise of other human rights, is a common exception. Most countries consider the right to life to be absolute and thus the balancing of human rights against public safety is especially delicate. Clearly, when dealing with the prevention of terrorism, this reality is especially acute.

In Israel basic rights, whether set forth in Basic Laws, regular statutes, or the common law, are not absolute. Their limitation must comply with the "Limitation Clause" contained in Basic Law: Human Dignity and Liberty. This clause was inspired by an article to the same effect in the Canadian Charter of Rights and Freedoms. This Limitation Clause states that "[t]he rights conferred by this Basic Law shall not be infringed save where provided by a law which befits the values of the State of Israel, intended for a proper purpose, and to an extent no greater than required, or under an aforesaid law by virtue of an explicit authorization therein."

On its face, this Limitation Clause provides a prescription for ways in which the infringements on human rights shall be carried out, but the matter is often quite difficult.

One of the major theoretical difficulties stems from the fact that in Israel a significant portion of the fight against terrorism takes place in the occupied territories, over which Israel's sovereignty is at best questionable. Thus, the application of Israeli law and the adjudication of Israeli courts over matters concerning these territories are not simple matters. In reality,

this problem is largely ignored. The Israeli Supreme Court, sitting as the High Court of Justice – Israel's central court in matters of constitutional and administrative law – routinely deals with petitions, filed by residents of the occupied territories and by others, regarding the activities of the Israeli army in these areas. Not only has the Government of Israel never questioned the jurisdiction of Israeli courts over such matters, it has explicitly requested that the Court deal with such petitions, probably in order to gain legal, public, and even international legitimacy. The legal basis for this adjudication is that the Israeli army is an Israeli governmental authority and as such is subject to the jurisdiction of Israeli courts even when operating outside the borders of the State. Although it is accepted that the primary legal norms that bind Israeli authorities in the territories are those of international law, as a governmental authority, the army – even when acting in the occupied territories – is bound, first and foremost, to the principles of Israeli constitutional and administrative law.

It seems the dilemmas embedded in the relationship between democracy and the battles against terrorism are commonly presented through an institutional prism that expresses a realistic legal outlook. The question that is often asked both in Israel and in other countries is, "what are the limits of judicial intervention in the anti-terror policies of the government, the army, and other national security entities?" To be more precise, the question is, "how should or could courts limit the means that other agencies employ in fighting terror?" Security authorities are purportedly responsible for protecting and preserving all aspects of democracy, including not only its existence but also those aspects concerning human rights. Experience, however, proves that in reality authorities not only in Israel, but also in other modern democratic states, are inclined to favor security interests. This is particularly evident during emergency periods, where to such authorities their duty to protect human rights seems to be secondary to their responsibility to ensure the security of the citizens and residents of their state. This behavior may be explained by the fact that a democratic government, as a representative of the people, may feel obliged to conform to the common public tendency to favor a rigid and uncompromising stance that grants national security a prominent status. Furthermore, it is also explained by the fact that security authorities are usually only experts in security. They consider themselves responsible for achieving optimal security. From their point of view, human rights considerations are only "external" constraints, carrying an inferior status. Courts are therefore the dominant guardians and protectors of human rights, especially in times of emergency. The Court assumes the vital role of balancing human rights and security considerations, so as to ensure the former are not trampled by the latter.

In what follows, I would like to present several legal problems that epitomize the tension between human rights and national security, with which the Israeli Supreme Court has recently been forced to deal.

### LONG-TERM DETENTION OF LEBANESE CITIZENS

THE FIRST ISSUE I will discuss is that of the long-term detention of Lebanese citizens in Israel. The Law of Administrative Detention authorizes the defense minister to detain an individual without trial. The purpose of this law is to prevent a threat to public security. This is achieved through the use of detention in a situation in which regular criminal proceedings cannot guarantee this public security. In such cases, the evidence is generally based on classified intelligence, which is likely to harm national security if revealed. The law, however, also requires that this

administrative or “preventative” detention, which is limited to an extendable six month period, be approved by the president of the District Court. The president of the District Court must then continue to review the arrest warrant every three months. It is important to note that the approval process is not one of judicial review but rather the court itself, not the defense minister, must be convinced that the administrative detention and the length of its duration are justified. For this reason, classified evidentiary materials are presented to the court and there is a right to appeal the District Court president’s decision imposing administrative detention to the Supreme Court.



*Dalia Dozmer takes questions during a presentation at the Washington College of Law.  
Credit: courtesy of WCL Alumni Events*

Based on the authority granted in this law, Lebanese citizens who were members of the *Hizballah* organization (an Iranian-backed and Syrian-supported militia that has waged a small-scale war against Israel from inside Lebanon) were held in administrative detention. These citizens were detained so that they could be used as “bargaining chips” in future negotiations for the exchange of Israeli prisoners of war believed to be held by terrorist organizations. The Lebanese prisoners themselves posed no specific threat to national security. This practice was approved by the District Court.

In 1997, a panel of three Supreme Court justices heard an appeal on the District Court’s approval. The majority opinion held that detention for the sake of negotiations concerning the future exchange of prisoners of war is of vital interest to the State. It found that detention for this purpose does indeed fall under the authority granted to the minister of defense by the Law of Administrative Detention. The minority opinion maintained that this law does not entitle the State of Israel to detain individuals to be used solely as bargaining chips in potential future negotiations.

Subsequently, a request for a further hearing was filed in response to this decision. Due to the significance of the issues raised in this case, a panel of nine justices heard the appeal. The Supreme Court reversed the District Court’s judgment, as well as that of the earlier Supreme Court panel majority, and ruled that the minister of defense does not have the authority to place a person in administrative detention with the sole pur-

pose of using him as a bargaining chip. The Court explicitly weighed the human rights of the detainees, specifically those under Basic Law: Human Dignity and Liberty, against Israel’s national security interests, and decided that human rights must prevail when the detainees do not themselves threaten national security. I note that the detention was also held to be illegal since the means used were not seen as proportional to the goal the state was seeking to attain. The detention was not based on sufficient evidence demonstrating that holding these prisoners would lead to the release of prisoners of war and soldiers missing in action.

In light of this judgment, most of the detainees were released. Two of them, senior members in Lebanese terror organizations, remained in custody after the Knesset enacted a new statute that legalized the detention of members of terror organizations.

#### THE USE OF FORCE IN INTERROGATIONS

A SECOND ISSUE that the Court has recently considered involves the use of force to elicit information regarding potential future terrorist activities.

The activities of the General Security Service (GSS) are the central means by which terrorist acts are prevented. The GSS investigations are not aimed solely at gathering evidence in order to prosecute those responsible for past terrorist activities, but also, even primarily, at the prevention of future terrorist acts. In an effort to further this delicate but extremely important goal, the GSS garners information from a multitude of sources, including from suspected terrorists or terrorist accomplices held in Israeli custody. It is clear that such information has the potential of saving the lives of tens, if not hundreds, of people as, regrettably, the terrorist activities in recent years have primarily been aimed at bombing areas in which large crowds congregate, such as buses, malls, and restaurants.

Indeed, the difficulty of this legal question and its tremendous implications for the welfare of the State of Israel are heightened by Israel’s enduring position that if it is not permitted to uncover the identities of terrorists using the investigative means it has traditionally employed, hundreds of lives are likely to be sacrificed.

The authority of the GSS to pursue preventative investigations has never been formally legislated, even though the use of physical force or other means of coercion is forbidden and criminalized under Israeli law. In reality, however, it seems that the GSS has continually made use of such interrogative methods in the course of its investigations.

A commission of inquiry headed by retired Chief Justice Moshe Landau was appointed to determine the status of physical coercion under Israeli law. The Landau(Commission) established that in an emergency situation – described as that of “a ticking time bomb waiting to explode” – the use of moderate physical force is permitted. The exact nature of such moderate force was defined in classified portions of the Commission’s report. The legal basis upon which such acts were permitted was found as being anchored in the criminal defense of necessity. The approach taken by the Commission was that the defense of necessity is based exclusively on the preference of the lesser evil. In other words, this exception to criminal liability applies in circumstances in which the infringement of a criminal prohibition is required in order to prevent a greater harm. The Commission emphasized that, following the example of the Model Penal Code in the United States, the test is a flexible one, where we determine the relative weights of the opposing evils which we must choose.

In September 1999, the Supreme Court, sitting in a panel of nine judges, unanimously ruled that such coercive methods are illegal. The decision of the Court detailed various methods utilized by the GSS, including shaking, the so-called “frog crouch,” and sleep deprivation, and concluded that the law does not authorize the GSS to employ them.

The Court also examined the necessity defense, which, as men-

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tioned above, had been the basis for the Landau Commission's authorization of "moderate physical pressure" under certain circumstances. The panel concluded that no general authority to establish directives regarding the use of physical means during interrogation can be implied from the necessity defense. The opinion stated that "[g]eneral directives governing the use of physical means during interrogations must be rooted in an authorization prescribed by law and not from defenses to criminal liability."

As a rule, a defense in criminal law is one that can only be evoked after the fact and does not suffice to grant authorization. An additional potential problem with the necessity defense also mentioned by the court is that under Israeli Penal Law the defense of necessity applies solely in cases where the criminal act is "necessary in an immediate manner," or imminent. This is not the case in many of the investigations in which coercive measures are employed. Nevertheless, the Court stated that it abstains from expressing its opinion regarding the question of the constitutionality of a statute explicitly authorizing the GSS to use physical pressure in certain interrogations, mainly those conducted in situations of a "ticking bomb," where by withholding the information he possesses, the terrorist endangers lives in an immediate sense. The Court did emphasize, however, that such legislation must adhere to the requirements set forth in Basic Law: Human Dignity and Liberty. When the issue was raised in the Knesset, it rejected the suggestions to enact such a statute. The reason for the rejection, apart from the moral dilemma, was mainly the fear that the statute would not comply with the requirements of the Basic Law or survive the comprehensive review of the High Court of Justice.

### JUDICIAL REVIEW OF ISRAELI DEFENSE FORCES ACTIVITIES

A RELATED ISSUE I turn to now surfaces when the Supreme Court is called upon to review the actions of the Executive Branch, particularly policies regarding the activities of the Israeli Defense Forces (IDF). The Court is obliged to review and issue its ruling in these paramount issues in "real time" whilst the "cannons roar."

It has long been the opinion of this Court that "it will not take a stance as to the manner in which the combat is being conducted" by the military forces. The position taken is that manners of combat, in which the lives of the soldiers are at stake, are best decided by the commanders in the field and not Justices "bearing cloaks."

The Court, however, does review these matters through a legal prism. This legal prism includes an interpretation of our constitutional system, domestic legislation, and principles of international law. Once the relevant laws and principles have been interpreted, the Court then reviews the actions taken, focusing on their proportionality and legal legitimacy.

In the last year alone, the Supreme Court has been called upon to review actions of the Israeli government and military forces, stemming from Israel's decision to fight the Palestinian terrorist infrastructure in a wide-scale operation known as "Defensive Shield." I now will review several of these decisions.

In the *Ambulance Case*,<sup>22</sup> it was alleged by the local Red Crescent Society that IDF soldiers fired upon and limited transportation of ambulances. This occurred following numerous instances in which ambulances were used for the transfer of arms, explosive materials, and terrorist gunmen. The Court began by uttering the first and foremost principle that the ambulances are protected under international law. In light of the frequent instances where ambulances were used in contravention of the First Geneva Convention, however, the Court stated that it is acceptable to remove the protection of medical establishments in certain circumstances. Such protections can be removed only after the forces on the

ground use proportionate means to determine the actual danger potentially posed by the ambulance team they confront. Simply put, the Court held that the IDF should refrain from firing upon ambulances without confirming, in every given situation, that they pose a specific threat, even if past experience has shown that ambulances are sometimes used for aggressive purposes.

Another issue recently brought before the Court concerned the petition of families of suicide bombers against their expulsion from their homes in Ramallah to the Gaza Strip. The government argued that this measure may deter other terrorists, who are instructed to act as human bombs or to carry out other terror attacks, from perpetrating their schemes.

The Court held that the deportation from Ramallah to the Gaza Strip, both subject to belligerent occupation by the same hostile forces, amounts to an order of assigned residence that is permitted under Article 78 of the Fourth Geneva Convention and not a deportation forbidden under Article 49 of the same convention.

The Court further stated that an order of assigned residence could be made against a person only if there is a reasonable possibility that the person himself presents a real danger to the security of the area. If he does not, consideration of deterring others in and of itself is insufficient. Even when such danger does exist, the IDF commander is authorized to issue an order of assigned residence only when it will aid in averting the danger. The Court noted that only when these conditions apply can the IDF commander also consider the deterrent factor in reaching its decision.

Indeed, the discretion that Israeli law provides to various functionaries, such as the Military Commander, is not absolute. The question of deterrence is not a factor that stands on its own, but rather is one relevant consideration in employing the means of an assigned residence.

To summarize, while both constitutional law and law at large are unable to solve all problems regarding the difficult war against terror, they can and do guide us when we confront difficult quandaries of our times. The Israeli Supreme Court is increasingly occupied with the challenges of the myriad of new situations and dilemmas, raised by the unfortunate reality in which we live.

Interestingly, a frequent criticism is that the percentage of the petitions granted from amongst those submitted by residents of the occupied territories is significantly lower than those submitted by Israeli citizens. It has been claimed that this fact represents the subordination of the Israeli Supreme Court to the government's security policies, even when these are hardly legal. This criticism, however, is flawed. In fact, the percentage of petitions submitted by residents of the occupied territories that fully or at least partially achieved their purpose is higher than the parallel general percentage. In many cases, the state, sometimes after the mediation of the judges, accepts the demands of the residents even before the matter reaches a judicial decision. There are also cases where the petition is formally rejected, but the Court includes in its decision instructions that practically allow for the complete or at least partial realization of the aspirations of the petitioners.

In spite of all this, the situation is not ideal. There are situations in which the balance struck between human rights and national security is disconcerting. Such is the case regarding the petitions submitted by families of terrorists against the demolition of their houses. The military commander is authorized to use such measures by law under the Defense Regulations 1945. The government argued that these measures are effective, needed, and may deter other terrorists and save lives. The government therefore argued that the Court, which reviews due process safeguards and the general proportionality of military action, should by and large defer and not intervene in this matter. This argument was accepted, despite doubts raised as to the compatibility of this ruling with inter-

national law. It must be added, however, that in a recent petition brought before me, the state affirmed that unless absolutely necessary, no demolition takes place without allowing for a hearing before the military commander and without giving an ample amount of notice. These conditions give the interested parties the option of appealing to the High Court of Justice, if they so desire.

Another extremely difficult issue that currently lies before us is the targeted assassinations of terrorists posing an acute danger to Israel and its citizens. These targeted assassinations are today carried out almost routinely. The Israeli government believes that these measures are required and appropriate because we are practically in a state of war.

There is currently a petition pending before the Court against this policy. According to the report of Amnesty International submitted by the petitioner, Palestinians are prohibited from attacking civilians, including settlers not bearing arms, and civilian objects. Israel is prohibited from attacking civilians and civilian objects unless they are firing upon or otherwise posing an immediate threat to Israeli troops or civilians.

The government submitted an opinion by the Attorney General, stating that "The Laws of combat, which are part of international law, permit injury, during a period of warlike operations, to someone who has been positively identified as a person who is working to carry out fatal attacks against Israeli targets." As of now, the court has asked the parties to comment on this policy after they review international and Israeli law, but declined to issue an immediate order.

In sum, it is clear that the difficulties are acute – there is no clear

judicial solution to this growing vicious cycle of violence and revenge – and the enforcement of human rights is often quite challenging. However, I believe that, as I attempted to demonstrate, much can be done. Israel's experience can serve as guide for other democracies seeking to solve similar dilemmas.

A related issue, which I will not explore fully, is the impact of modern-day terror on international law. The deterrence of today's terror, which is of the worst and most dangerous kind of terror and includes many suicide bombers who are willing to sacrifice their lives in order to kill innocent civilians, present great difficulties. It seems that, largely due to many years of the Cold War, international law has yet to have agreed upon accepted measures to combat these terrorist practices. This in many cases stems from a lack of understanding by countries that do not have "hands on" experience with the atrocious reality Israeli has been forced to face. Thus, a consensus or commonly accepted practice is difficult to reach. The future development of international law on this issue remains to be seen, but will undoubtedly be extremely interesting.

I conclude with the words of Ludwig Wittgenstein from the *Tractatus Logico-Philosophicus*, written while fighting on the front lines during World War I: "We feel that if all possible scientific questions be answered, the problems of life have still not been touched at all. Of course there is no question left, and just this is the answer." *HRB*

*Dalia Dornier, Israeli Supreme Court Justice, presented this lecture at the Washington College of Law on September 17, 2003.*



*Dalia Dornier and Dean Claudio Grossman of the Washington College of Law.  
Credit: courtesy of WCL Alumni Events*